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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 533.

IN THE MATTER OF 2168 BROADWAY CORPORATION,

Debtor,

DUPARQUET HUOT & MONEFSE CO., E. E. ALLEY CO. INC., and H. B. DAY CO., INC.,

Petitioners,

—against—

FRYSINGER EVANS, DU-WEL-CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC. and GRAMERCY QUALITY LAUNDRY CO. INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

DANIEL A. SHIRK,
EDWIN R. WOLFF,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Opinions Below.

The opinion of the District Court (R. 17-19) is reported in 11 Fed. Supp. 404. The opinion of the Circuit Court of Appeals (R. 30-34) is reported in 78 F. (2d) 678.

Jurisdiction.

The order of the Circuit Court of Appeals was entered July 22nd, 1935 (R. 34-35). The petition for

a writ of certiorari was filed October 22nd, 1935. The jurisdiction of this Court is invoked under Section 740 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Question Presented.

Is a foreclosure action involving real property, in which a receiver has been appointed, and who is administering and receiving the income therefrom, an "equity receivership" within the meaning of Section 77-B (a), Bankruptcy Act, 11 U. S. C. A., Section 207 (a), so as to confer upon alleged creditors of the corporation which had legal title to the property at the time the petition was filed, the right to subject the corporation and its alleged property to the jurisdiction of the Bankruptcy Court?

Statutes Involved.

The applicable provisions of the Statutes involved are set forth in the Appendix, *infra,* pages 19, 20.

Statement.

Three persons alleging that they were creditors of the 2168 Broadway Corporation, filed a petition under Section 77-B (a) of the Bankruptcy Act, to effect a reorganization of that corporation (R. 1-9).

They alleged they had provable claims against the corporation, in excess of $1,000 (R. 2); that the corporation was unable to meet its debts as they matured, and that it had committed an act of bankruptcy within four months preceding the filing of the petition (R. 4). It was conceded by petitioners in the Court below, that the petition did not allege an act of bankruptcy,

as there was no allegation of insolvency in the bankruptcy sense (Section 3-a, Bankruptcy Act; 11 U. S. C. A. Section 21 (a)). Petitioners insisted however, that there were sufficient allegations of fact set forth in the petition to show that there was an "equity receivership" pending, within the meaning of Section 77-B (a). These facts consist of the allegations that on or about October 15th, 1934, an action was commenced in the Supreme Court of the State of New York, County of New York, against the corporation, to foreclose a mortgage on the property of the corporation; that the complaint in that action alleged the corporation's default in payment of interest on the mortgage, which had matured on September 19th, 1934; that thereafter the Court appointed receivers of the said property of the corporation, in said action; that the receivers went into possession, and at the time of the filing of the petition, held the property and were receiving and administering the income therefrom for the benefit of the plaintiff in said action (R. 4).

Certain statements in the petition, it has been conceded, are inaccurate. For instance, the allegation that the corporation is a subsidiary of, and all of the stock thereof is held by or for Commonwealth Bond Corporation, has been admitted to be inaccurate (R. 7).

Other creditors of the corporation, respondents herein, moved to dismiss the petition on the ground that the petition does not set forth sufficient facts to give the Court jurisdiction under Section 77-B of the National Bankruptcy Act, as amended. It was specifically set forth in the notice of motion that the petition fails to allege an act of bankruptcy (R. 13-14). It was further contended by respondents, that a mortgage foreclosure action in which receivers have been

appointed to collect rents, is not an "equity receivership" within the meaning of Section 77-B.

The District Court held that a receivership that is merely incidental to the foreclosure of a mortgage on real estate of a corporation that is unable to meet its debts as they mature, is not of the quality of the "equity receivership", which, under the provisions of Section 77-B, and in the absence of an act of bankruptcy, will confer upon creditors of the corporation a right to subject it and its property to the jurisdiction of the bankruptcy court (R. 17-19). The order on the motion of respondents to dismiss the petition was made and entered on May 13th, 1935, by the District Court (R. 20-22). Upon appeal, the Circuit Court of Appeals affirmed the order of the District Court on substantially the same grounds as those stated by the District Court. The Circuit Court of Appeals held that the kind of suit to which the words "equity receivership" are usually applied in common parlance, is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation, insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver; that the end sought by such a suit is the liquidation of the assets and equitable distribution among creditors; and that it was a receivership of this general type, which Congress had in mind when it enacted Section 77-B (R. 32).

Argument.

The Question Involved in the Case at Bar Is Academic.

Petitioners filed an involuntary petition against the 2168 Broadway Corporation, under Section 77B

of the Bankruptcy Act as amended, and alleged, as the basis for the Court's jurisdiction that the debtor had committed an act of bankruptcy, which consisted, so they alleged, of the fact that a receiver had been appointed in a mortgage foreclosure action covering real property alleged to be owned by the corporation (R. 4). At the argument in the District Court they conceded that the petition did not allege an act of bankruptcy. They insisted, however, that the petition did show the existence of an "equity receivership" within the meaning of Section 77B (a), and that under that statute where it is shown that an "equity receivership" is pending, no act of bankruptcy need be alleged.

We shall take up subsequently the question of law, whether or not the petition in fact did show the existence of an "equity receivership" within the meaning of Section 77B.

Subsequent to the order of the Circuit Court of Appeals, which was made on July 22nd, 1935, and which affirmed the order of the District Court, dismissing the petition as insufficient in law, the mortgage foreclosure action described in the petition, was discontinued, and the receivership in said action, terminated on October 10th, 1935 by an order duly made and entered.

Moreover in December, 1934, and almost two months *prior* to the filing of the petition for adjudication, one, Frysinger Evans, commenced a representative action in the Supreme Court of the State of New York against 2168 Broadway Corporation (alleged debtor herein) and others, to have it adjudged that the said defendant held the real property known as Hotel Manhattan Towers, as a trustee for the benefit of the plaintiff and others similarly situated; thereafter,

and on May 14th, 1935, a decree was entered in that action, in which it was adjudged in substance, that the said 2168 Broadway Corporation and others, were each a trustee for the benefit of the plaintiff, Evans, and others similarly situated, and that the subject matter of the trust is the real property which the petitioners herein described in their involuntary petition, filed under Section 77B. Under that judgment, therefore, the 2168 Broadway Corporation, alleged debtor herein, was never the beneficial owner of the real property, which was the subject matter of the foreclosure proceeding. It has been held that a Court of bankruptcy has no jurisdiction over a debtor in its trust capacity, or over trust property. *In re Commonwealth Bond Corporation*, 77 F. (2d) 308 (C. C. A. 2).

The question, therefore, of what is meant by an "equity receivership", so far as it involves the case at bar, has become academic, and no real controversy exists.

A foreclosure action involving real estate in which a receiver to collect rents has been appointed, is not an "equity receivership" within the meaning of Section 77-B

The question presented on this application hinges upon the definition to be given to the words "equity receivership", to be found in Section 77-B of the Bankruptcy Act, as amended.

The District Court and the Court of Appeals decided that these words were subject to construction; that they refer to a receivership of the general type known as the "conservation" suit; that during the progress of the bill Congress was familiar with this type of receivership; that the phrase is used in appo-

sition to "a prior proceeding in bankruptcy"; that the rule of *ejusdem generis* is applicable; that this form of receivership, like bankruptcy, looks to a liquidation of assets and an equitable distribution among creditors; that the legislative plan was to aid a distressingly large number of corporations which had been or were in danger of being placed in bankruptcy or equity receivership of the general type described, and that the purpose of the legislation was to supersede proceedings looking to liquidation by proceedings looking to reorganization. Accordingly the two lower courts held that a receiver appointed in a mortgage foreclosure action was not an "equity receivership" (R. 17-19, 32-33).

The same conclusion was reached by another District Court in *In re Draco Realty Corp.* (D. C. S. D. N. Y.), 11 Fed. Supp. 405. See also *In re Laclede Gas Light Co.* (D. C. E. D. Mo. June 26, 1934, not officially reported).[1] Opposed to these decisions are three cases arising in the Eastern District of Illinois, wherein Judge Lindley held that a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" within the meaning of Section 77-B. *In re Flamingo Hotel Co.*[2] (Aug. 9, 1934, not officially reported); *In re Surf Bldg. Corp.* (Oct. 17, 1934, not officially reported); and *In re Granada Hotel Corp.* (D. C.) 9 Fed. Supp. 909. The case last

1. This opinion appears in the bankruptcy law service of Commerce Clearing House, Inc., pages 1101-1103, paragraph 3001.

2. Friendly, in *Some Comments on the Corporate Reorganizations Act*, 48 Harv. L. Rev. (1934) 39, 54 (Note 57), states his view of the conflict between the *Laclede* and the *Flamingo* cases as follows:

> "• • • The decision in the *Flamingo Hotel* case, E. D. Ill., Aug. 9, 1934 is *contra*. *It is submitted that the Laclede decision is correct, and that the term 'equity receivership' should be restricted to proceedings initiated by the filing of a general creditor's bill* and should not be applied to proceedings purely for the enforcement of liens even though such proceedings involve the appointment of a receiver of the property subject to the lien." (Italics ours.)

cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit, in a short *per curiam* opinion, 78 F. (2d) 409 (rehearing denied July 26, 1935).

It has been held by this Court that it is its duty to give effect to the intent of Congress; that primarily this intent is to be ascertained by giving the words used their natural and literal significance; but that if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, rules of construction require further investigation into the reason of the enactment and its history; that the Statute will be given the effect Congress intended, sacrificing, if necessary, the literal meaning; that other parts of the statute must be considered and that a construction strictly according to the letter, without regard to the legislative intent, is not to be desired. We believe that these canons of construction have been definitely laid down by this Court.

Ozawa v. *United States,* 260 U. S. 178, 194;
Helvering v. *New York Trust Company,* 292 U. S. 455, 464;
Ebert v. *Poston,* 266 U. S. 548, 554.

In the *Ozawa* case, *supra,* Mr. Justice Sutherland, in the opinion of the Court, stated (p. 194):

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look into the reason of the enactment and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacri-

ficing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638."

In *Helvering* v. *New York Trust Company, supra,* Mr. Justice Butler, writing the opinion for the majority of the Court, said (p. 464):

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language, is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commissioner of Immigration* v. *Gottlieb,* 265 U. S. 310, 313; *Bate Refrigerator Co.* v. *Sulzberger,* 157 U. S. 1. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, this Court said (p. 194): 'It is well settled that, in interpreting a statute, the Court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' * * *.
>
> In *Barret* v. *Van Pelt,* 268 U. S. 85, this Court applied the rule laid down in *People ex rel. Attorney General* v. *Utica Ins. Co.,* 15 Johns. 358, 381, that 'a thing which is within

> the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers * * *.' "

In *Ebert* v. *Poston, supra,* Mr. Justice Brandeis, in the opinion of the Court, stated (p. 554):

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

When we pause to consider the circumstances under which Congress enacted 77B, we find that at the time of its enactment an unusual number of bankruptcy proceedings, voluntary and involuntary, were pending. In addition thereto a great many general equity receiverships, as that phrase has been commonly understood and accepted by the Bench and Bar, were in existence. Like in bankruptcy, the end sought in these receiverships, was the liquidation of the assets and their equitable distribution among creditors (see *Gordon* v. *Washington,* 295 U. S. 30, 38). It was the plan of the Congress to prevent this very condition that Section 77B was enacted. The legislative history of the act[3] makes the conclu-

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[3] For the legislative history of Section 77B, *see* Friendly, *Some Comments on the Corporate Reorganizations Act,* 48 Harv. L. Rev. (1934), 39, 49, *et seq.*

As originally drafted, Section 77B (H. R. 5884) contained no provision authorizing creditors to petition for involuntary reorganizations. The bill was proposed by Mr. McKeown. When, in the course of hearings before the House Judiciary Committee, Mr. McKeown was requested to state his reasons for the absence of a provision authorizing creditors to petition for involuntary proceedings, he replied:

> "The reason we do not apply it to creditors is this: Any corporation that becomes insolvent or unable to meet its debts as they mature—the creditor has a very drastic remedy. *He has*

sion irresistible that it was this type of general equity receivership which Congress had in mind when it used this phrase in Section 77B.

A consideration of the statute as a whole leads us, it is respectfully submitted, to the same result. As may be observed, the phrase "equity receivership" immediately follows the words "a prior proceeding in bankruptcy". Again, at almost the very beginning of Section 77B (a), it provides that where the petition or answer is approved, the Court shall have and may exercise all the powers, which a Federal Court would have, had it appointed a receiver in equity of the property of the debtor, *by reason of its inability to pay its debts as they matured.*

We feel that the construction for which we contend, is made clear when we consider the incidents of a receivership in a mortgage foreclosure action. This form of action is usually based upon a default in performing the terms and conditions of a specific bond and mortgage. The ability of the corporation to pay its debts as they mature, is in no way involved in such an action. The receivership in such an action is primarily for the benefit of the plaintiff mortgagee (*Sullivan* v. *Rosson,* 223 N. Y. 217). In general, the receivership in a mortgage foreclosure action is entirely different from that which exists in a receivership which has been created because of the

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the remedy of the receivership, a Federal receivership immediately. He goes in and can put the corporation either into involuntary bankruptcy or into the hands of a receiver. For that reason we did not want to impair his rights to go in at any time, and we saw no necessity why a creditor should want to reorganize when he puts the corporation in involuntary bankruptcy *or into a receivership.* The Corporation, if it wants to reorganize, can come in and save itself." (Italics ours.) (U. S. Judiciary Committee (House) Hearings, 73 Cong. (1-2 Sess.), p. 202.)

See also House Judiciary Report on Section 77B of the Bankruptcy Act. (This report is conveniently set out in the Bankruptcy Law Service of Commerce Clearing House, Inc., pp. 857-864.) Dodd, Reorganizations through Bankruptcy: A Remedy for What? 48 Harv. L. Rev. (1935) 1100: 78 Cong. Rec. 7890, 7905-7907.

corporation's inability to meet its debts as they mature.[4]

In New York, under the old Chancery practice, the Court would not appoint a receiver in a foreclosure action unless it was satisfied that the security was inadequate for the debt, even though there is a stipulation in the mortgage providing for the appointment of a receiver (*W. I. M. Corporation* v. *Cipulo,* 216 App. Div. (New York) 46 (1926)). Subsequent to this decision, and in 1930, the New York Legislature amended the law.[5] Under the amendment it was provided that where a mortgage contained a provision for the appointment of a receiver in the event of default, such provision must be construed as meaning that the mortgagee is entitled to the appointment of a receiver, without notice and without regard to the adequacy of the security for the debt. Thus we find that in New York, since 1930, a receiver in a foreclosure action is in fact a statutory receiver, and not strictly speaking, a receiver appointed under the old Chancery practice.

The receivers appointed in the foreclosure action

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[4] In an equity receivership the orders appointing the receivers and providing for their powers usually contain an omnibus injunction restraining the prosecution of all claims against the corporation; there is provision made for the filing of claims by creditors; the marshalling of assets; the liquidation thereof and the ratable distribution among creditors. The proceeding takes on all the aspects of a bankruptcy proceeding. In a receivership in a mortgage foreclosure action we find none of these things.

[5] Laws of 1930, Chapter 166, adding subdivision 10 to Section 254, Real Property Law, which reads as follows:

"10. Mortgagee entitled to appointment of receiver. A covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness."

described in the petition in the instant case, were appointed under this very subdivision. They were appointed without notice and without regard to the adequacy of any security of the debt.[6]

Prior to the enactment of Section 77B, it was held that the appointment of a receiver in a foreclosure action, did not constitute an act of bankruptcy, even though the bankruptcy act provides[7] that it is an act of bankruptcy where a receiver or a trustee has been appointed or put in charge of a person's property while he is insolvent. (See *Standard Accident Insurance Company* v. *E. T. Sheftel & Co.*, 53 Fed. (2d) 40, 41, C. C. A. 4.) Petitioners concede that there is no such thing as "a proceeding in equity receivership", and that a suit that looks merely to the appointment of an equity receiver, must be dismissed. (See *Gordon* v. *Washington, supra.*)

We respectfully submit that since there is no action or proceeding known to the law as "equity receivership" this phrase is ambiguous, and it should be given the meaning that Congress intended. It is further submitted that to construe this phrase as meaning the appointment of a receiver in any action, suit or proceeding, irrespective of the end sought, whether such receivership cover all or part of a corporation's property, does violence to the purpose and intent of Congress. It would lead to "an unreasonable result, plainly at variance with the policy of the legislation as a whole".

It is contended by petitioners that sub-division (i) of Section 77-B sustains their argument that Congress intended to include within the phrase "equity

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[6] The application of a Federal Statute very often depends upon a local law. Compare *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, 335; *Philips* v. *Commissioner*, 283 U. S. 589, 602.

[7] Section 3 (a) (5) Bankruptcy Act; 11 U. S. C. A. Sec. 21 (a) (5).

receivership" the receivership in an action to foreclose a mortgage, whether it be on all or a part of the corporation's property. To us, such a construction is strained, unfair and unreasonable. Under this subdivision the petition may be filed "as provided in subdivision (a) of this section". Contrary to the statement contained in petitioners' brief, we have never urged that the receivership must exist only in a Federal Court. Our contention has always been that the receivership may be in a Federal Court or in a State Court or in a Territorial Court, but that irrespective of where it may be, it must have come into existence because the corporation was insolvent in the common law sense, namely—that it was unable to pay its debts as they matured[8] and that a receivership which came into existence for some other reason, such as a default in performing the terms of a bond and mortgage, did not satisfy the statutory requirements.

Petitioners urge that subdivision (i) expressly provides that the receivership need only cover a part, or it may cover all, of the corporation's property. In the case at bar, the petition alleges that it covers all of the property. It is submitted that the logic of their reasoning compels them to assert that even if it only covered a part of the corporation's property, the requirements of Section 77-B are satisfied.

We take the liberty to suggest a situation which might serve to illustrate the danger of sustaining petitioner's argument. The X corporation is the owner of five parcels of real estate. One of these it acquired about a year ago, with the hope that it might

[8]In addition to the equity receiverships in the Federal Court, we respectfully ask the Court to consider the same type of receivership which exists in New Jersey and other states. The latter come into existence because of the inability of the corporation to pay its debts as they matured, and have all of the characteristics of a Federal equity receivership.

prove profitable. At the time of its acquisition, the corporation executed no bond, mortgage or extension agreement, in which it became obligated to pay the mortgage indebtedness, or any part thereof. It assumed none of the obligations with respect to this parcel, but purchased the same subject to all the liens and encumbrances thereon. After one year of operation, the corporation finds this parcel to be unprofitable. It is perfectly willing to let it fall by the wayside. The corporation is eminently solvent, though temporarily embarrassed for lack of cash. In connection with this particular parcel, the holder of a mortgage thereon has a right to apply *ex parte* for the appointment of a receiver. The receiver is appointed. The corporation is not in need of any reorganization. A great many of its creditors are satisfied that it is to the best interests of all concerned to keep the corporation out of court. *Quaere*: Was it the intention of Congress, under the assumed facts, to confer upon creditors the right to subject this corporation and its property to the jurisdiction of a bankruptcy court?

Petitioners assert that subdivision (i) specifically covers such a case, because it is an equity receivership covering a part of the corporation's property. This subdivision, however, was enacted, it seems to us, to cover the case of a chain store corporation, having property in more than one state. If an equity receivership came into existence in one state, covering only a part of the corporation's total property, that condition would satisfy the statutory requirement. As the Court of Appeals said in the case at bar (R. 33-34):

> "In the case at bar the mortgage covered all the debtor's property, but the logic of the ap-

> pellants' position, as they concede, compels them to argue for the same results however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true, refers to the appointment of all or any part of the property of a corporation. This, we think, contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings."

The law was enacted primarily "for relief of debtors" (77-A). To permit three creditors holding claims of just above $1,000, to file an involuntary petition under 77-B, under the hypothetical case, would lead to an absurd and impractical result. The corporation would probably be doing more to help its creditors by abandoning the particular property (or by selling the deed for a nominal sum) than it would be doing if it attempted to retain the property and the burdens that go with it. We hope no court shall ever approve the unscrupulous use of the involuntary petition under such circumstances. It seems to us that the petitioners' whole argument is based upon the false assumption that the equity foreclosure receivership came into existence because the corporation was unable to meet its debts as they matured. They assert that the foreclosure of a corporation's property is usually "a symptom of financial distress". As we have pointed out in the hypothetical case, the assumption is unreasonable.

It is further urged by petitioners that the creditors should not be left to the mercy of the debtor's own board of directors, which through deadlock or other motives, may be unwilling or unable to help. We

hope that the court will not indulge in such an improbable presumption. If the corporation finds it necessary to avail itself of Section 77-B, the statute makes ample provision for its invocation, without the necessity of alleging "a pending equity receivership". If the corporation does not desire to avail itself of Section 77-B, the creditor is not without a remedy, for that section did not in any way repeal the bankruptcy act, but merely conferred additional jurisdiction pursuant to its provisions, upon the Bankruptcy Court. After all, a fair and reasonable view requires the conclusion that a corporation will always take such steps as the law provides, for the conservation, preservation and protection of its desirable property.

We are unable to say, with certainty, whether or not the decision of the Circuit Court of Appeals for the Seventh Circuit, in the case of *In re Granada Hotel Corporation, supra,* is in conflict with the decision of the Court of Appeals in the case at bar. If the basis of the receivership in the *Granada* case, was the inability of the corporation to pay its debts as they matured, then we respectfully submit that the decision is not in conflict with the case at bar. We have observed that in the *Granada* case, the foreclosure receiver had been discharged and the property turned over to the trustee under the mortgage indenture, pursuant to an order of the Court. Just what the provisions of this order were, we are unable to say.

CONCLUSION.

The decision of the Circuit Court of Appeals construing the phrase "equity receivership" to mean a receivership which came into existence because of the inability of the corporation to pay its debts as they matured, is correct. We are unable to say whether there is a conflict of decisions upon that question. Since the question in the case at bar is purely academic, we oppose the petition and respectfully urge that it should be denied.

Dated, New York, November 12th, 1935.

Respectfully submitted,

DANIEL A. SHIRK,
EDWIN R. WOLFF,
Counsel for Respondents.

APPENDIX.

Section 77-B (a) Bankruptcy Act as amended, Title 11 U. S. C. A., Section 207 (a), provides as follows:

> "Three or more creditors who have probable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, *if a prior proceeding in bankruptcy or equity receivership is not pending,* that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall, within ten days after the service of a copy of such petition upon it, answer such petition." (Italics ours.)

Section 77-B (i), 11 U. S. C. A., Section 207 (i), provides:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court * * *, a petition or answer may be filed under this section and any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section * * *."

Section 3 (a) (5) Bankruptcy Act, 11 U. S. C. A., Section 21 (a) (5), provides:

> "ACTS OF BANKRUPTCY. (a) Acts of bank-

ruptcy of a person shall consist of his * * *; or (5) made a general assignment for the benefit of his creditors, or, while insolvent, a receiver or a trustee has been appointed, or put in charge of his property; * * *."

Section 1 (15) Bankruptcy Act, 11 U. S. C. A., Section 1 (15), provides as follows:

"Section 1, MEANING OF WORDS. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * * (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, as a fair valuation, be sufficient in amount to pay his debts * * *."